IN THE SUPREME COURT

Request from the United States Court of Appeals
for the Ninth Circuit for a Certified Question

Honorable Barry G. Silverman, Circuit Judge

PETER DEACON,

Plaintiff-Appellant,

v. Docket No. 151104

PANDORA MEDIA, INC.,

Defendant-Appellee.

Brief on Merits of Certified Question – Appellant

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Michigan Cases

Federal Cases

Michigan Statutes

Federal Statutes

Michigan Court Rules

Federal Rules

Other Sources

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(5), because it involves a request from a federal court to respond to a certified question pursuant to MCR 7.305(B). The certified question was docketed in this Court on February 25, 2015.

II. STATEMENT OF QUESTION INVOLVED

Has Deacon stated a claim against Pandora for violation of the Michigan Video Rental Privacy Act ("VRPA"), MCL 445.1711, *et seq*. by adequately alleging that Pandora is in the business of "renting" or "lending" sound recordings, and that he is a "customer" of Pandora because he "rents" or "borrows" sound recordings from Pandora?

Trial Court Answer: No

Ninth Circuit Court of Appeals Answer: N/A

Appellant's Answer: Yes.

Appellee's Answer: No.

III. STATEMENT OF FACTS

A. Pandora Delivers Music to Registered Users over the Internet.

Defendant-Appellee Pandora Media, Inc. ("Pandora") operates a website, www.pandora.com, that functions as a massive for-profit music library. (App. at 140a, 288a.)[1] Pandora's music service is free to use, but it also offers a premium version of the service without advertisements for a fee. (*Id.* at 290a-291a; see also *id.* at 121a.) While Pandora refers to itself as a "radio station" (*Id.* at 289a, 122a), it differs from traditional broadcast radio in three critical respects.

First, to listen to Pandora, consumers must register for the service, whereupon Pandora automatically creates a "Personal Page" for the user containing "the person's full name, profile information, most recent 'station,' recent activity, listening history, bookmarked tracks, and bookmarked artists . . . ." (App. at 144a; see also *id.* at 148a.) As such, unlike traditional broadcast radio, Pandora gathers and retains personal information regarding each of its individual listeners. (*Id.*) Plaintiff-Appellant Peter Deacon, a Michigan resident, was one such listener who created a Pandora account in 2008 and subsequently listened to music from Pandora. (*Id.* at 145a.)

Second, while a traditional radio station uniformly broadcasts the same song at the same time to all its listeners, Pandora provides a unique, customizable experience to each of its individual listeners based on that listener's musical tastes.

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[1] Citations to "App." refer to Appellant's Appendix, filed with this Court on April 22, 2015 with his Brief Supporting Request for a Certified Question. Citations to "Pandora Br." refer to Appellee's Brief in Support of Request for a Certified Question from the Ninth Circuit Court of Appeals.

(App. at 140a.) Pandora plays different songs for different users based on the musical preferences inputted by the user (such as the name of a song or a particular artist) as well as real-time feedback from the user, all while keeping detailed records of the user's specific listening activity. (*Id.* at 140a, 289a.)

Third—and most relevant to the question presented here—while a traditional radio station operates by broadcasting radio waves that are interpreted by listeners' radio receivers, Pandora directly delivers digital song files to the memory of its users' computers. (App. at 143a.) Specifically, a digital copy of the song is temporarily stored on the user's computer. (*Id.*) This allows Pandora users—unlike broadcast radio listeners—to play, pause, or skip songs. (*Id.* at 140a, 255a, 275a, 290a.) When the user is finished with the song, Pandora removes it from the user's computer. (*Id.* at 143a.)

B. Pandora Discloses Its Users' Personal and Statutorily-Protected Information.

Michigan's Video Rental Privacy Act ("VRPA") prohibits any company "engaged in the business of selling at retail, renting, or lending . . . sound recordings" from disclosing "a record or information concerning the purchase, lease, rental, or borrowing of [sound recordings] by a customer that indicates the identity of the customer" without the customer's written permission. MCL 445.1712; (App. at 142a-143a). Despite this statutory prohibition, Pandora regularly and publicly disclosed its Michigan users' private and protected information. (App. at 140a.)

Specifically, Pandora disclosed to internet search providers such as Google its users' Personal Pages, including that of Deacon, thereby allowing them to be

indexed by the search providers. (App. 141a, 144a, 148a.) As a result, anyone and everyone with access to the Internet—along with the search providers themselves—had access to Deacon's private and statutorily-protected information, including his full name, music-rental history, and music preferences. (*Id.* at 141, 144a, 148a.)

In addition, Pandora unilaterally—and without notice—integrated its users' Personal Pages with their accounts on the social network Facebook. (App. at 144a.) Pandora's Facebook integration automatically disclosed Deacon's full name, music-listening history, and musical preferences to other Facebook users. (*Id.* at 145a.) Pandora did not seek or obtain its customers' consent prior to integrating their Pandora accounts with their Facebook accounts nor did it give them an opportunity to opt-out before doing so. (*Id.* at 144a-45a, 148a, 291a.)

C. Deacon Files Suit Against Pandora.

In light of Pandora's unlawful disclosure of his personal and statutorily-protected information, Deacon filed suit against Pandora in the United States District Court for the Northern District of California, where Pandora has its principle place of business. (See App. at 139a-151a.) The federal district court dismissed Deacon's VRPA claim on the pleadings, prior to any discovery taking place. (*Id.* at 114a, 292a.) While the district court found (and the Ninth Circuit agreed, App. 283a) that Deacon "sufficiently alleged the disclosure of information governed by the VRPA," (*id.* at 120a), it held that—as a matter of law—Pandora "never rented, lent or sold sound recordings to him." (*Id.* at 121a.)

Deacon appealed that ruling to the United States Court of Appeals for the Ninth Circuit, presenting the issue on appeal as whether Pandora is " 'engaged in the business of . . . renting, or lending . . . sound recordings' within the meaning of [the VRPA]." (App. at 39a.) Following briefing and oral argument, the Ninth Circuit certified to this Court the following question:

> Has Deacon stated a claim against Pandora for violation of the VRPA by adequately alleging that Pandora is in the business of 'renting' or 'lending' sound recordings, and that he is a 'customer' of Pandora because he 'rents' or 'borrows' sound recordings from Pandora?

(*Id.* at 298a-299a.) On April 22, 2015, Deacon filed his brief urging this Court to take up the Ninth Circuit's certified question. On May 27, 2015, Pandora agreed that this Court should accept the certified question, and further presented its views on how the Court should answer that question. At the request of this Court, Deacon now addresses the merits of the certified question and submits that the answer is an unqualified "yes."

IV. ARGUMENT

Michigan has a long tradition of protecting individual privacy, and was "one of the first jurisdictions to acknowledge the concept of [a] 'right to privacy.' " *Beaumont v Brown*, 401 Mich 80, 93; 257 NW2d 522 (1977), overruled on other grounds by *Bradley v Bd of Ed of the Saranac Co Sch*, 455 Mich 285, 302; 565 NW2d 650 (1997). This right protects against the "unreasonable and serious interference with [a citizen's] interest in not having his affairs known to others." *Hawley v Prof Credit Bureau, Inc*, 345 Mich 500, 514; 76 NW2d 835 (1956) (SMITH, J., dissenting).

The VRPA followed from the legislature's belief that a statute was needed "to explicitly protect a consumer's privacy" because "[m]any in Michigan . . . believe that one's choice in videos, records, and books is nobody's business but one's own." House Legislative Analysis, HB 5331, January 20, 1989; (App. at 168a.) The statute specifically "recognize[d] that a person's choice in reading, music, and video entertainment is a private matter, and not a fit subject for consideration by gossipy publications, employers, clubs, or anyone else, for that matter." HB 5331.

By prohibiting the unauthorized disclosure of information concerning consumer's entertainment choices, the VRPA places control over that information firmly in the hands of consumers. Pandora, however, took this control away from Deacon—and in the process violated the VRPA—by publicly disclosing his music listening choices over Facebook and the rest of the internet without his consent.

Pandora tries to excuse its disclosure of Deacon's private and statutorily-protected information by asserting that it is not covered by the VRPA because it does not "rent" or "lend" (and its users do not "borrow") music. As explained more fully below, however, that assertion is patently false. Deacon alleges—and because this case is only at the pleading stage, those allegations must be taken as true—that Pandora temporarily provides digital copies of song files to its users' computers, which it or the user later removes. This is "renting" or "lending" (and its users are "borrowing") music under any definition of those terms. While Pandora raises a host of arguments to support its position that temporarily placing a song

file on a computer does not constitute renting, lending, or borrowing sound recordings, all of its arguments are ultimately without merit.

A. The Allegations in Deacon's Complaint Must Be Taken as True; the Facts Outside the Record Asserted by Pandora Must Be Disregarded.

The Ninth Circuit couched the certified question in terms of pleading, asking if "Deacon *stated a claim . . . by adequately alleging* that Pandora" rented or lent sound recordings under the VRPA. (App. at 299a) (emphasis added). The issue before the Ninth Circuit is whether the district court erred in dismissing Deacon's claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). When a federal court decides a motion to dismiss, the court must accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. (See App. at 49a.)

Michigan pleading standards are in accord: a motion under MCR 2.116(C)(8) for failure to state a claim should be granted only "where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1994). Factual allegations in support of the claim are construed in the light most favorable to the nonmoving party; all well-pleaded facts, together with any inferences or conclusions that can reasonably be drawn therefrom, are accepted as true. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Hence, the court "does not act as a factfinder" or attempt to probe the parties' ability to prove their allegations. *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984).

Consequently, in deciding the certified question, the allegations in Deacon's complaint—most notably the allegation that Pandora temporarily places a digital copy of a song file on the user's computer (App. at 143a)—must be taken as true. Conversely, factual assertions *outside* the record—of which Pandora introduces several—should be disregarded and *not* taken as true. *Dunnebacke v Detroit, G.H. & M. Ry. Co.*, 248 Mich 450, 457; 227 NW 811 (1929) ("[W]e cannot go outside of the record before us and consider a ground not existing at the time the motion to dismiss was made in the circuit."); see also *Coburn v Coburn,* 230 Mich App 118, 126; 583 NW2d 490 (1998) (Coburn I) ("Michigan jurisprudence bars argument predicated on matters outside the record and deems such tactics 'inappropriate.' "), rev'd on other grounds, 459 Mich 875; 585 NW2d 302 (1998) (Coburn II); *Kirshner v Uniden Corp of America*, 842 F2d 1074, 1077 (CA 9, 1988) (holding appellate record limited to materials submitted to trial court); FR App P 10(a)(1) (stating the record on appeal consists of "the original papers and exhibits filed in the district court"); see also Ninth Cir R 10-2 (stating the record on appeal consists of official transcript and the district court clerk's record of original pleadings, exhibits and other papers filed with the district court).[2]

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[2] The following seven statements are portrayed as "facts" and then relied upon by Pandora in its briefing to this Court, but are *not* alleged in the Complaint or implicated in any way by the allegations: (1) Pandora streams music by placing a temporary music file that consists of only a portion of a song rather than the whole song on its customers' computers so that the song will not pause or skip (Pandora Br. at 4, 11, 18); (2) Pandora customers cannot choose what artists' music will be delivered *(id*. at 4, 5*);* (3) Pandora customers cannot copy or save songs (*id*. at 4); (4) Pandora users cannot share a song with others by transferring a file (*id.* at 4); (5) Pandora's paid service costs $4.99 per month and does not allow the customer to

B. Pandora is in the Business of Renting and Lending Music to Customers Like Deacon who Borrow Songs From Pandora's Library.

The certified question asks this Court to determine what the statutory terms "rent," "lend," and "borrow" mean in the VRPA and whether Pandora's conduct as alleged by Deacon falls within their scope. It is this Court's obligation in construing statutory terms "to discern the legislative intent that may reasonably be inferred from the words expressed in the statute by according those words their plain and ordinary meaning." *Sotelo v Township of Grant*, 470 Mich 95, 100; 680 NW2d 381 (2004); see also *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999) ("The primary goal of statutory interpretation is to give effect to the intent of the Legislature.").[3] Where, as here, the legislature has not expressly defined terms within a statute, this Court may turn to dictionary definitions to aid its goal of

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chose songs or artists, fast forward, rewind, or reply songs (*id*. at 4, 5,); (6) Pandora customers are only allowed to skip a certain number of songs per hour (*id*. at 4,16); and (7) that Pandora allows customers to only listen to a song once (*id*. at 18). Consequently, as discussed above, these factual assertions of Pandora should be disregarded. In any event, it is widely known that contrary to Pandora's outside facts, Pandora transmits full copies of songs, which are not actually deleted by Pandora until the program is closed and that that can easily be converted to MP3s and stored by music pirates. See e.g. *How to Move Downloaded Pandora Songs To iTunes Library!* <http://www.se7ensins.com/forums/threads/how-to-move-downloaded-pandora-songs-to-itunes-library.804959/> (accessed June 17, 2015). The point here is that, at best, these are matters for factual discovery and may not be considered in determining whether Deacon has sufficiently alleged a claim against Pandora.

[3] Pandora claims that because the VRPA has a penal component, the rule of lenity requires a narrow construction. (Pandora Br. at 11.). This argument has been repeatedly rejected as the VRPA has separate civil damages and criminal penalties and the rule of lenity generally applies to interpreting the scope and severity of criminal penalties. See, e.g., *Kinder v Meredith Corp*, unpublished opinion of the Eastern District Court, issued August 26, 2014 (Docket No. 14-CV-11284).

construing the statute's terms in accordance with the legislature's manifest intent. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

Common dictionary definitions support a finding that Pandora lends—and Deacon borrowed—sound recordings from its music library. Black's Law Dictionary defines "lend" as "[a]n act of lending: a grant of something for temporary use." *Black's Law Dictionary* (9th ed.); see also *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994) (defining "loan" in Michigan statute as "the act of lending; a grant of temporary use of something: the loan of a book"). "Lend" is also commonly defined as "[t]o contribute or impart," "to provide," or "to furnish or impart." See *The Free Dictionary*, *Lend*, <http://www.thefreedictionary.com/lend> (accessed June 17, 2015) (citing *The American Heritage Dictionary of the English Language, Collins English Dictionary—Complete and Unabridged* (5th ed), and *Random House Kernerman Webster's College Dictionary* (2010)). Likewise, Webster's defines "lend" as "to put at another's temporary disposal." Merriam-Webster Dictionary, *Lend*, <http://www.merriam-webster.com/dictionary/lend> (accessed June 17, 2015).

In addition to dictionary definitions, common understanding of the terms "lend" and "borrow" also confirm that Pandora's conduct falls within the plain meaning of the statute. Pandora and others describe its service by reference to its "library" of songs. See e.g. *Pandora Form S-1 Registration Statement* (filed February 11, 2011), pg. 72 ("Form S-1") <http://www.sec.gov/Archives/edgar/data/1230276/000119312511032963/ds1.htm> (accessed June 17, 2015) ("For example, our advertisers can create custom 'branded'

stations from our music *library* that can be accessed by our listeners, as well as engage listeners by allowing them to personalize the branded stations through listener-controlled variables.") (emphasis added); *Pandora Radio*, <https://en.wikipedia.org/wiki/Pandora_Radio> (accessed June 17, 2015) ("As of IPO, Pandora had 800,000 tracks from 80,000 artists in its library . . . ."). But under common understanding of the terms, libraries "lend" and their patrons "borrow" materials. See, e.g., *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 574; 737 NW2d 476 (2007).

Further, dozens of Michigan libraries and millions of Michigan library patrons understand that "lending" and "borrowing" occur when a customer with an account or library card downloads an electronic entertainment file to their computer for a temporary period of time. See, e.g., West Bloomfield Township Public Library, *eLibrary – eBooks FAQs*, <http://www.wblib.org/elibrary/ebooksfaq.php> (accessed June 17, 2015) ("eBooks check out for 21 days and automatically check themselves back in."); West Bloomfield Township Public Library, *eLibrary – eAudioBooks FAQs*, <http://www.wblib.org/elibrary/eaudiobooksfaq.php> (accessed June 17, 2015) ("Downloadable audiobooks, or eAudiobooks, are similar to books on CD except that you will use your home computer or smartphone/tablet device to download the title. Once downloaded, you can listen to the audiobook on your computer . . . When the audiobook expires, it ceases working, and you can remove it from your computer or device."). This understanding of borrowing extends to Pandora customers' receipt of digital music. See Herrick District Library, *Movies &*

Music, <http://www.herrickdl.org/movies_music> (accessed June 17, 2015) (offering patrons the option to "download individual songs . . . with Freegal, or borrow and listen instantly to today's hottest albums with Hoopla") (emphasis added); Cadillac Wexford Public Library, *E-books, E-Audios, Emagazines and More* <http://www.cadillaclibrary.org/e-books> (accessed June 17, 2015) ("Borrow free video, music, and audiobooks with your library card.") (emphasis added).[4]

Likewise, Pandora's competitors in the internet media distribution industry recognize that when they provide a customer with a temporary digital copy of a media file, they have rented or lent the media to the customer. For instance, Amazon.com,[5] Apple, Inc.,[6] Vudu, Inc.,[7] and the Cable & Telecommunications Association for Marketing[8] all offer digital rental services. These services all operate

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[4] See also eBranch@RHPL, *eAudioBooks*, <http://ebranch.rhpl.org/index.php/eaudiobooks> (accessed June 17, 2015) ("Books may be loaned for either a 7, 14, or 21 day period . . . Your books will automatically be returned once the loan period is up.") Many libraries, including Rochester Hills Public Library, have the Freegal Music Service, which offers patrons access to streamable and downloadable music.

[5] See Jeffrey A. Trachtenberg & Stu Woo, *Amazon, Now a Book Lender* <http://online.wsj.com/article/SB10001424052970204621904577014273003626952.html> (accessed June 17, 2015).

[6] See *iTunes Store: Movie rental frequently asked questions (FAQ): About Renting Movies from the* iTunes Store <https://support.apple.com/en-us/HT201611> (accessed June 17, 2015).

[7] Vudu Customer Help, *See How long do rentals last?* <https://vudu.custhelp.com/app/answers/detail/a_id/89> (accessed June 17, 2015).

[8] The Cable & Telecommunications Association for Marketing consists of 18 cable service providers, as well as cable programming providers, studios, and suppliers, see CTAM, *Corporate Members* <https://www.ctam.com/membership/pages/corporate-members.aspx> (accessed June 17, 2015), and offers a digital rental service called Movies On Demand. See

just like Pandora by temporarily providing customers with digital media files for the customers to watch, listen to, or read.[9]

Thus, under both dictionary definitions as well as common usage, transfer of a digital media file for a temporary period of time constitutes "lending" and "borrowing" of that file. And because Deacon alleges that in using its service, Pandora allowed him "to temporarily store a digital copy of the song currently playing on his computer" (App. at 143a), Pandora "lent," and he "borrowed," music files. For this reason alone, the answer to the Ninth Circuit's certified question—has Deacon adequately alleged that Pandora lent and he borrowed sound recordings—is yes.[10]

Movies On Demand, *Frequently Asked Questions*, <http://www.rentmoviesondemand.com/faqs> (accessed June 17, 2015).

[9] See Notes 5 – 8, above; see also James Joyner, *Why Owning Beats Renting, Digital Music Edition <http://www.outsidethebeltway.com/why-owning-beats-renting-digital-music-edition/>* (accessed June 17, 2915); Jamie Lendino*, How to Buy Digital Music <http://www.pcmag.com/article2/0,2817,2341746,00.asp>* (accessed June 17, 2015) ("Subscription services like Rhapsody and Napster let you rent unlimited melodies for a monthly fee in lieu of buying individual tracks. The music stops when you terminate your subscription.")

[10] Despite offering a paid monthly service, Pandora also claims it is not in the business of renting music. (Pandora Br. at 14.) While rentals often involve a monetary component, common usage shows that rental and lending do not require payment. Undoubtedly, libraries rent and lend written materials, videos, sound recordings, and their digital counterparts to their patrons; indeed, the VRPA's legislative history shows that the legislature intended the Act to apply to library rentals. House Legislative Analysis, HB 5331, January 20, 1989. But most libraries do not charge their patrons for rentals and do not even charge for library membership. *See*, *e.g.*, Detroit Public Library, *Library Cards and Circulation Policies* <http://www.detroit.lib.mi.us/library-cards-and-circulation-policies> (accessed June 8, 2015). To the extent the dictionary definition of "rent" requires an exchange of "rent" for property, Pandora admits that it primarily derives revenue through advertising. Form S-1 at 2 ("We offer our service to listeners at no cost and we generate revenue primarily from advertising."). Thus,

C. Pandora's Arguments to the Contrary are without Merit.

Pandora offers several arguments in an attempt to support its position that, despite the fact that it provides users with a temporary copy of a song file from its digital library, it does not lend—and its users do not borrow—song files. First, it argues that "the common definitions of [rent, lend, and borrow] require an element of possession, use and control over the sound recordings," which—according to Pandora—its users lack. (Pandora Br. at 13.) Second, it argues that because its Terms of Service do not say it is renting, lending, or borrowing music that it does not engage in such conduct. (Pandora Br. at 19.) Third, it argues that federal copyright law supports its position that it does not rent or lend sound recordings. Finally, Pandora argues that it does not fall within the VRPA because application of statutes to new technology is best left to the legislature. (Pandora Br. at 23.) As explained below, each of these arguments is without merit.

1. Even if "renting," "lending," and "borrowing" require possession, use, and control of sound recordings, Pandora users have it.

Pandora's "possession, use, and control" argument boils down to an assertion that listening to borrowed sound recordings is a "passive" activity, and that Pandora users lack total control of the song file. (Pandora Br. at 17.) But even if borrowing

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Deacon gave Pandora "rent" in the form of advertising impressions and valuable personal and demographic information. See *id.* ("We generate advertising revenue primarily from display, audio, and video advertising, which is typically sold on a cost-per-thousand impressions, or CPM, basis.").

does require some sort of possession, use, and control over the borrowed material, Pandora is simply incorrect that passive use and partial control do not suffice.[11]

i. Pandora's passive use argument is contrary to both this Court's precedent and the cases cited by Pandora.

Pandora's argument that its users are simply passively listening to songs and thus do not have the according-to-Pandora requisite possession, use, and control over the digital sound recordings temporarily stored on their computers is contrary to both this Court's precedent and the cases Pandora itself cites to support its position.

In *People v Flick*, 487 Mich 1, 4-5; 790 NW2d 295 (2010), this Court was tasked with determining whether the viewing of child pornography on the internet amounted to "knowing possession" of that material when those files only existed in "temporary internet files" or had been deleted but remained on "allocated space." Like Pandora here, the defendant argued that "he simply engaged in the passive viewing of the images on his computer screen," and that such passive activity meant he could not have possessed (and therefor could not have used or controlled) that material. *Id.* at 6-7. This Court found that argument "chimerical," and reasoned

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[11] Ironically, Pandora accuses Deacon of introducing arguments related to "use" and "control" for the first time before the Ninth Circuit. (See Pandora Br. at 16.) But Pandora did not address "use" and "control" in the district court either. While whether or not these issues were raised before the district court is ultimately irrelevant to this Court's determination of the certified question, the parties did not raise them until the appeal because it was the district court that first raised the issues of "use" and "control" in its dismissal order. Nevertheless, the Ninth Circuit expressly ruled that the facts about Deacon's ability to pause, skip, and delete songs are part of the record because they were introduced in the Complaint by reference to, and reliance on, Pandora's Form S-1. (App. at 290a.)

that by subscribing to and accessing the pornographic material, the defendant necessarily had sufficient "control or dominion" over the electronic files, as control need not be exclusive. *Id.* at 14, 16-17. As this Court explained, "the creation and deletion of temporary Internet files by a computer depends on the volitional actions taken by the computer user" in searching for and causing the temporary files to be created in the first instance. *Id.* at 21.

Pandora's argument fails here for the same reason as the purported passive child pornography viewer in *Flick*. Here, Deacon registered with and listened to music through Pandora, which caused music files to be delivered to his computer (be it in permanent or temporary memory). (App. at 143a, 145a.). As in *Flick*, that constituted "volitional actions taken by the computer user" establishing "control or dominion" over digital files stored on his computer, even if they were stored only temporarily.

Not only is Pandora's passive use argument undermined by this Court's precedent, however, it is also undermined by the cases Pandora cites in support of its position. In *Bailey v United States*, 516 U.S. 137, 143; 116 S Ct 501; 133 L Ed 472 (1995), the United States Supreme Court acknowledged that "use" is not amenable to a single definition, and in fact can refer to a range of passive and active conduct. *Id.* ("[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable to it. Consider the paradoxical statement: 'I *use* a gun to protect my house, but I've never had to *use* it.' "). If one can "use" a gun to protect one's house without ever brandishing it, one can "use" a song file by

listening to it without any further volitional conduct other than the actions take to transfer it to one's computer temporarily.

Likewise, in the other case cited by Pandora, *United States v Trinidad-Aquino*, 259 F3d 1140, 1144-45 (CA 9, 2001), the Ninth Circuit held that the phrase "use of physical force against the person or property of another" in a federal statute required more than negligence. The interpretations of "use" in the statutes at issue in *Bailey* and *Trinidad-Aquino* as requiring volitional conduct, however, in no way suggest that seeking out and listening to a sound recording—like owning but not brandishing a gun in the home protection context—is not also "use." As noted above, this Court suggested the opposite is true.

Consistent with these cases, Pandora users possess, use, and control the music files in the same way that library patrons do with books, Blockbuster customers do with DVD movies, and tenants do with apartments: they seek out and take temporary possession of property (here, a digital music file), just as they can with books, DVDs, or apartments. Further, Pandora users like Deacon can—if they choose to do so—use the digital song file by listening to it, just as book borrowers, movie renters, and apartment lessees can choose to enjoy (through reading, watching, or occupying) the property over which they have taken temporary possession.[12]

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[12] Pandora asserts—without citation—that return is an element of renting, lending, or borrowing. (Pandora Br. at 18.) While Pandora users do not return the sound recordings to Pandora, they do relinquish control over them either through a user-initiated event (such as skipping a song or closing the Pandora player) or automatically at the end of a set time period (after allowing a song to play to

ii. Pandora users have control over the song files.

Pandora also argues that obtaining temporary possession of digital media files only constitutes borrowing if the borrower has the ability to choose a specific title, the ability to access any part of the media by fast forwarding or rewinding, and to listen, watch, or read the media as many times as desired. (Pandora Br. at 17.) Pandora's argument is, at its core, that its users do not possess, use, and control the song files placed on their computers because they have limited, rather than absolute, control over them. But *limitations* on selection or use do not mean there is no use at all, and complete control is not a prerequisite for "borrowing," "renting," or "lending," within any common meaning of those terms.

Pandora's claim that borrowing and renting require the ability to select specific titles is false, as several eBook and digital album of the month clubs provide titles of the club's choosing to their users. See e.g. *What it is*, <http://www.dzancbooks.org/ebook-club/> (accessed June 17, 2015) (providing a club-selected eBook each month); Chris Robley, *Record Clubs are Back: The Lesson for Indie Artists* <http://diymusician.cdbaby.com/2013/05/record-clubs-and-download-clubs/> (accessed June 17, 2015) (discussing several digital album of the month club options where the club selects the new music to be delivered).

Further, automobiles, bowling shoes, and banquet halls, among other things,

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completion). Form S-1 at 70, 72; (App. at 143a). As shown by similar mechanisms employed by libraries in lending eBooks and eAudioBooks, and streaming media vendors such as Apple and Vudu, relinquishing control over a digital media file suffices in lieu of actual return.

may all be rented with restrictions on their use, but the fact that a rental car may have a speed limiter, or that bowling shoes may not be worn outdoors, or that outside food may not be taken into a banquet hall in no way means that customers do not possess, use, and control the rented or borrowed property. Likewise, no one would suggest that a video rental company's prohibition on copying or modifying DVDs means that its customers do not "use" (and that the company thus does not "rent" or "lend") those DVDs.

Similarly, that Pandora users cannot fast-forward or rewind the sound recordings and can only listen to them once during the borrowing period in no way suggests that they do rent or borrow the song files. One can borrow an egg from a neighbor or a match to light a cigarette, and the fact that the egg or match can be consumed only once does not mean it was not used or borrowed.[13] To accept Pandora's strained reading of the VRPA would be to hold that the defining characteristics of renting and lending are the ability to fast-forward, rewind, and replay. It would also mean that a person whose DVD player's fast-forward and rewind buttons are broken cannot be said to rent, borrow, or even use DVD movies.

Here, though Pandora users like Deacon may not have had *complete* control over the sound recordings placed temporarily on their computers, they had *some* control over them. Users could play or skip songs, or pause playback to resume

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[13] See Merriam-Webster Dictionary, *Use* <http://www.merriam-webster.com/dictionary/use> (accessed June 17, 2015) (defining "use" as including "to expend or consume" and citing eggs and matches as examples of such use).

later. See Form S-1 at 70, 72.[14] In short, Pandora users like Deacon had possession, use, and control over the digital sound recordings, and Pandora's arguments to the contrary regarding passive use and partial control do not change that fact. Consequently, even if Pandora is correct that renting, lending, or borrowing requires possession, use and control, it is incorrect that Deacon lacked it here.

2. Pandora's Terms Of Use are irrelevant to determining whether it is renting or lending under the VRPA.

Pandora next argues that it cannot be found to rent or lend music files because its Terms of Use do not specify that they constitute a rental or lending agreement, and that they further prohibit its users from copying, editing, or modifying the music files. (Pandora Br. at 19.) This argument fails as both a practical and legal matter.

As a practical matter, the Terms of Use are indistinguishable from restrictions imposed in other rental or lending contexts. For instance, the restrictions imposed by the Terms of Use are the same restrictions imposed by other renters of books, movies, and music. See, e.g., Redbox, *Terms and Conditions* <http://www.redbox.com/terms#anchor4> (accessed June 17, 2015) ("You also agree that you will not . . . modify, frame, reproduce, archive, sell, lease, rent, exchange, create derivative works from, publish by hard copy or electronic means, publicly perform, display, disseminate, distribute, broadcast, retransmit, circulate to any third party or on any third-party website, or otherwise use the Materials . . . ."); see

[14] As noted above, the Ninth Circuit expressly ruled that Pandora's statements regarding its customers' ability to play or skip songs, or pause playback song as stated in its Form S-1 is properly part of the record. (App. 209a.)

also Vudu.com, *Vudu, Inc. Terms of Service* <http://www.vudu.com/termsofservice.html> (accessed June 17, 2015) ("You may not edit, modify, copy, distribute, transmit, download, display, perform, reproduce, license, translate, create derivative works from, transfer, alter, adapt, sell, rent or sublicense any Content, or facilitate any of the foregoing."). Thus, because the restrictions imposed by the Pandora Terms of Use are nearly identical to restrictions common in the rental and lending industry, they suggest that Deacon did, in fact, rent or borrow music from Pandora.

As a legal matter, Pandora's reliance on *Apple v Psystar, Inc.*, 658 F3d 1150, 1159 (CA 9, 2011), cert den 132 S Ct 2374, 182 L Ed 2d 1017 (2012), for the proposition that its Terms of Use somehow define the scope of its relationship with its users and nature of its business for purposes of the VRPA is equally misplaced. *Psystar* was a "copyright misuse defense" case where the court allowed Apple—as owner of the copyright and the licensor of its operating system software—to place certain limits on what type of computers its software could be loaded onto as a matter of federal copyright law. *Id.* at 1158-59. That decision was limited to the rights held by owners of the copyrights, but as Pandora admits it does not own the rights to any of the songs in its library, it has no right to speak for those that do. (Pandora Br. at 21.) As such, Pandora cannot impose copyright licensing restrictions on Deacon, let alone licensing restrictions regarding copyrights it doesn't even hold.

3. Copyright law is irrelevant to the VRPA and does not prohibit this Court from finding that Pandora rents or lends sound recordings.

Pandora next turns to federal copyright law and argues that because "the Copyright Act addresses 'renting' and 'lending' in regards to sound recording" that principles of statutory construction require the VRPA to adopt the same definitions so as to avoid inconsistency. (Pandora Br. at 20.) This argument is curious given that the Copyright Act does not define the terms "rent," "lend," or "borrow."[15] (*See* App. 214a-248a.) In fact, Congress could have chosen to apply the Copyright Act's definitions to different areas of state law, but "Congress elected not to … leav[ing] the states free to propound law in the areas of the common law rights of privacy…." without concern for any incongruity. *Allied Artists Pictures Corp v Rhodes*, 496 F Supp 408, 444 (SD Ohio 1980). What Pandora fails to understand is that just because copyrighted music is mentioned in Deacon's complaint and "the presence of the copyrighted programming is central to understanding the factual background of this case, [Deacon] is not pursuing copyright claims." *Echostar Satellite, L.L.C. v Viewtech, Inc*, 543 F Supp 2d 1201, 1209 (SD Cal 2008). Nothing in this case will

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[15] These terms can of course take on different meanings depending on the circumstances in which they are used. See e.g. *First Trust Co of St. Paul v Commonwealth Co*, 98 F2d 27, 31 (CA 8, 1938) (discussing different meanings of "income" in state, federal, and municipal laws and private agreements, and noting that "'gross income,' cannot be said to convey the same definite and inflexible significance under all circumstances and wherever used. Its meaning depends on the connection in which it is used and the result intended to be accomplished."); *Lee v Madigan*, 358 US 228, 231; 79 S Ct 276; 3 L Ed 2d 260 (1959) ("Only mischief can result if [the same words appearing in different statutes] are given one meaning regardless of the statutory context.").

have any impact on Pandora's continuing copyright licensing and royalty battles as those issues are irrelevant to this Court's to the construction of the VRPA.

This is because whether Pandora's provision of music implicates the copyright holders' "renting" or "lending" interests for purposes of federal copyright law, that law serves a very different purpose than Michigan's VRPA. The purpose of federal copyright law as it relates to sound recordings is to protect the economic viability of new music production. See *Arista Records, LLC v Launch Media, Inc*, 578 F3d 148, 157 (CA 2, 2009) ("In sum, from the SRA to the DMCA, Congress enacted copyright legislation directed at preventing the diminution in record sales through outright piracy of music or new digital media . . . ."). In contrast, the purpose of the VRPA is the protection of listeners' privacy in their choice of music. HB 5331, (App. at 168a.)

Acknowledging distinctions between public performance and renting or lending may make sense for the purpose of copyright law, which involves maintaining a delicate balance between performance as advertising (which drives music sales) and performance as alternative to purchase (which suppresses music sales). See generally *Arista Records*, 578 F3d at 152-57. In contrast, such a distinction has *no* relevance to the purpose of the VRPA in protecting listeners' musical preferences from disclosure by their music providers. Given the difference in purpose, copyright law and federal precedent interpreting it, "cannot be allowed to rewrite Michigan law." *Garg v Macomb Co Community Mental Health Servs, (Amended Opinion)*, 472 Mich 263, 283; 696 NW2d 646 (2005) ("The persuasiveness

of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis.")

Nevertheless, Pandora argues that "under the Copyright Act, Internet radio is a performance and nothing more." (Pandora Br. at 21.) This argument, however, ignores the Copyright Act's explicit statements that the rights in the public performance of a sound recording by a digital audio transmission operate separately and independently of the rights implicated by lending, renting, or selling a copy of a sound recording. 17 USC 114(d)(4)(C). The United States Senate Report to the Digital Performance in Sound Recording Act is illustrative of the error in Pandora's argument. That report provides:

> Where a digital audio transmission is a digital phonorecord delivery as well as a public performance of a sound recording, the fact that the public performance may be exempt from liability . . . or subject to a statutory licensing . . . does not in anyway limit or impair the sound recording copyright owner's rights [concerning sale, rental, or lending] under section 106(3) . . . or where an interactive digital audio transmission constitutes a distribution of a phonorecord as well as a public performance of the sound recording, the fact that the transmitting entity has obtained a license to perform the sound recording does not in any way limit or affect the entity's obligation to obtain a license to distribute phonorecords of the sound recording.

S Rep 104-128 at 27 (Aug. 4, 1995). Simply put, Congress contemplated and accounted for instances where the delivery of digital audio materials—such as

Pandora's temporary placement of a sound recording on a user's computer—may be both a public performance and an act of lending or renting under the Copyright Act.

Nor do any of the cases cited by Pandora suggest that internet radio cannot be both performance and renting or lending. Pandora completely ignores the court's statement in *United States v American Society of Composers, Authors, & Publishers*, 627 F3d 64, 74 n10 (CA 2, 2010) that its holding "does not foreclose the possibility, under circumstances not presented in [that case], that a transmission could constitute both a stream and a download, each of which implicates a different right of the copyright holder." Similarly, the single footnote to which Pandora cites in *Bonneville Int'l Corp. v Peters*, 347 F3d 485, 489 n8 (CA 3, 2003) does not conclude that "streaming" music on the one hand, and "lending" or "renting" music on the other are always mutually exclusive.

The *Arista Records* decision is similarly inapposite. There the court was considering whether an internet radio website that operated in a manner similar to Pandora was "interactive," and therefore qualified for statutory licensing. *Arista Records*, 578 F3d at 150-51. Not only was there a fully developed factual record about how the defendant's services operated from a trial of that case, Pandora listeners have far greater control over the selection of specific songs and artists than was determined to have existed there, making it questionable as to whether the service was indeed "interactive." Regardless, such a finding is irrelevant to Plaintiff's VRPA claim here.

Ultimately, Pandora is asking this Court to accept, without the benefit of any discovery, that its service cannot be found to be lending because of inapplicable legal distinctions in copyright law. Not only should the Court reject Pandora's request for the reasons set forth above, but also because Pandora is plainly not simply engaging in public performance like a radio or television broadcaster. Pandora admits that it is transmitting actual digital copies of music, not merely signals over the airways or through a satellite. Unlike Pandora's service, broadcast radio, TV, and satellite, by their inherent technical nature, do not keep documentation of consumers' viewing or listening habits.[16] In common terms, Pandora is operating more like Netflix's "streaming," which is unquestionably renting or lending movies, than ABC or CBS airing a sitcom.

4. The VRPA applies to new technologies such as that used by Pandora.

Pandora's final argument is that the VRPA should be read only to apply to technology as it existed in 1988 and that Deacon is improperly seeking to have the Court expand the scope of the VRPA by applying it to modern media. (Pandora Br. at 22.) Pandora relies on two cases it claims requires an act of the legislature to apply the VRPA to Pandora and its users, yet neither case precludes the Court from applying old statutes to new technology. First, Pandora's claim that *Howell Educ Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 234; 789 NW2d 495 (2010)

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[16] In fact, the VRPA repeatedly uses the phrase "record or information" describing entities covered, the prohibitions against disclosure, and the exceptions thereto. MCL §§ 445.1711-15.

stands for the proposition that the application of an older statute to new technology "is best left to the legislature" (Pandora Br. at 23-24), is a misapplication of the court's reasoning and concerns about new technology. In *Howell,* the court declined to expand the meaning of "public records" under the Freedom of Information Act ("FOIA") to include personal emails, but its reluctance was not based on any doctrinal aversion to reading statutes so as to apply to new technology. Rather, because FOIA's application required showing an "official function" for retaining public records, the court was cautious about construing "public records" to include the personal emails at issue because doing so would suggest that technological conveniences could constitute "official functions," which would "drastically expand" the scope of the statute beyond the legislature's manifest intent. *Id*. at 500-501.

Conversely, a finding that Pandora lends, and its users borrow, songs under the VRPA would not drastically expand the scope of the VRPA beyond the legislature's manifest intent. To the contrary, such a finding would prevent exactly what the Legislature found to be an invasion of privacy when it passed the law. In fact, contrary to Pandora's assertions, this Court has been more than willing to apply a statute to new technology by discerning what the intent of the legislature would have been under circumstances presented by that new technology. See, e.g., *People v Stone*, 463 Mich 558, 564; 621 NW2d 702 (2001) (finding that a cordless telephone conversation constitutes a "private conversation" under Michigan eavesdropping statutes, notwithstanding the ubiquity of advanced eavesdropping technology). Indeed, the court in *Howell* cautioned that its decision in that case

"[does] not suggest that a change in technology cannot be part of the circumstances that would result in a significant change in the scope of a statute." *Howell,* 287 Mich App at 238.

Further, as noted above, in *People v Flick,* the court construed the Michigan Penal Code provision criminalizing the "knowing possession" of child pornographic material to apply to defendants who purposefully viewed the prohibited material on the Internet. *Flick*, 487 Mich at 3. While the Court's dissenting opinion expressed concern that temporary internet files at issue did not fit within the technical or usual meaning of the statute's words "knowingly possess," the majority reasoned that "the Internet has become the child pornographer's medium of choice," and that it would "strain credibility to think that the Legislature intended the provision at issue—designed to protect children from sexual abuse—to preclude the prosecution of individuals who intentionally access and purposefully view depictions of child sexually abusive material on the Internet." *Id.* at 22.

The same can be said in the instant case. Just as the Internet has replaced print distribution as the medium of choice for child pornographers, digital delivery music services like Pandora have replaced physical albums as the medium of choice for music listeners.[17] Thus, construing the meanings of "lend" and "borrow" in a way

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[17] The rise in digital delivery and streaming services suggests that the move to digital-only distribution of music will only increase over time. For example, digital music sales overtook CD sales for the first time in 2012, accounting for 55.9% of total sales. *The Nielsen Company & Billboard's 2012 Music Industry Report: Music Purchases at All-Time High*, <http://www.businesswire.com/news/home/20130104005149/en/NielsenCompany-Billboard's-2012-Music-Industry-Report#.U1qe-vk7uM4> (accessed June 17, 2015).

that would preclude Pandora's liability for disclosing the songs to which its users listen without consent would contradict the Legislature's intent to protect the privacy of individuals' personal music preferences. Accordingly, finding that Pandora and its users fall within the VRPA's coverage is a proper judicial function and gives effect to the statute's legislative intent.[18]

V. CONCLUSION

Because Deacon alleges that Pandora temporarily places digital music files on its users' computers, he has sufficiently alleged that Pandora "lends" (and its users "borrow") sound recordings under the VRPA. Consequently, Deacon respectfully requests that this Court answer the certified question "yes," and inform the Ninth Circuit that Plaintiff adequately pleaded that Pandora violated the VRPA.

In 2013, streaming services cut into the digital sale market, with companies like Pandora receiving a 32% increase in usage. *U.S. Music Industry End of Year Review: 2013* <http://www.nielsen.com/us/en/reports/2014/u-s-music-industry-year-end-review-2013.html> (accessed June 17, 2015).

[18] Pandora also contends that had the legislature wished to broaden the coverage of the VRPA, it could have amended the statute so that it covered all persons or entities engaged in the business of "providing" or "delivering," instead of limiting the coverage of the statute to the business of "selling at retail, renting, or lending" such materials. (See Pandora Br.at 22-23.) However, the Court in *People v Flick* took no issue with the legislature's decision to punish those who "knowingly possess" without including more precise language that would indicate an intent to punish "viewing" the prohibited materials. In fact, it was irrelevant to the Court's holding that the legislative history expressly contemplated the increasing relevance of the Internet medium, yet the statutory language did not acknowledge new offenses that might result therefrom. See Julianne C. Fitzpatrick, *People v Flick: Modernizing Michigan's Child-Pornography Statute to Criminalize "Viewing" in Response to Evolving Internet Technology,* 46 New Eng L Rev 909 (2012).

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Respectfully submitted,

Peter Deacon

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ADDENDUM

Video Rental Privacy Act, MCL 445.1711 – 15

445.1711 Definitions.

Sec. 1.

As used in this Act:

(a) "Customer" means a person who purchases, rents, or borrows a book or other written material, or a sound recording, or a video recording.

(b) "Employee" means a person who works for an employer in exchange for wages or other remuneration.

(c) "Employer" means a person who has 1 or more employees.

445.1712 Record or information concerning purchase, lease, rental, or borrowing of books or other written materials, sound recordings, or video recordings; disclosure prohibited.

Sec 2.

Except as provided in section 3 or as otherwise provided by law, a person, or an employee or agent of the person, engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings shall not disclose to any person, other than the customer, a record or information concerning the purchase, lease, rental, or borrowing of those materials by a customer that indicates the identity of the customer.

445.1713 Exceptions.

Sec 3.

A record or information described in section 2 may be disclosed only in 1 or more of the following circumstances:

(a) With the written permission of the customer.

(b) Pursuant to a court order.

(c) To the extent reasonably necessary to collect payment for the materials or the rental of the materials, if the customer has received written notice that the payment is due and has failed to pay or arrange for payment within a reasonable time after notice.

(d) If the disclosure is for the exclusive purpose of marketing goods and services directly to the consumer. The person disclosing the information shall inform the customer by written notice that the customer may remove his or her name at any time by written notice to the person disclosing the information.

(e) Pursuant to a search warrant issued by a state or federal court or grand jury subpoena.

445.1714 Violation as a misdemeanor.

Sec. 4.

A person who violates this act is guilty of a misdemeanor.

445.1715 Civil action for damages.

Sec. 5.

Regardless of any criminal prosecution for a violation of this act, a person who violates this act shall be liable in a civil action for damages to the customer identified in a record or other information that is disclosed in violation of this act. The customer may bring a civil action against the person and may recover both of the following:

(a) Actual damages, including damages for emotional distress, or $5,000.00, whichever is greater.

(b) Costs and reasonable attorney fees.